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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	88646255
Applicant	Gunther's Quality Ice Cream, Inc.
Applied for Mark	GUNTHER'S
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Gunther's Quality Ice Cream, Inc.

Serial No. 88646255

Filed: Oct. 08, 2019

Mark: GUNTHER'S

APPLICANT'S APPEAL BRIEF

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I. DESCRIPTION OF THE RECORD

On October 8, 2019, Applicant Gunther's Quality Ice Cream, Inc. ("Applicant") applied (Ser. No. 88/646,255; the "Application") for registration of the mark GUNTHER'S ("Applicant's Mark") for use on or in connection with:

ice cream, non-dairy frozen confections in Cl. 30; and

restaurant services *featuring ice cream and non-dairy frozen confections, namely frozen dessert parlors* in Cl. 43 (amended, as shown in italics, Feb. 27, 2021 Request for Reconsideration after Final Action, TSDR p. 4)

("Applicant's Goods/Services"). Oct. 8, 2019 TEAS Plus New Application, TSDR pp. 1 – 2. April 7, 2021 Reconsideration Letter, TSDR p. 1.

The Office made final its refusal to register GUNTHER'S based on its belief of a likelihood of confusion with previously registered marks under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d):

With respect solely to Applicant's Goods/Services in Cl. 43, the Office has cited Reg. No. 1435063 for the mark GUNTHER TOODY'S reciting use on "restaurant services", owned by Car 54, LLC.

With respect solely to Applicant's Goods/Services in Cl. 30, the Office has cited Reg. No. 4556314 for the mark GUNTHER'S GOURMET reciting use on "sauces", owned by Gunther's Gourmet Groceries, LLC.

Aug. 27, 2020 Final Office Action, TSDR p. 2.

A Request for Reconsideration was filed with this Appeal on February 27, 2021 (Feb. 27, 2021 Request for Reconsideration, TSDR pp. 1-97), and was denied on April 7, 2021 (April 7, 2021 Reconsideration Letter TSDR pp. 1-20). This appeal is timely and was resumed on April 8, 2021. (5 TTABVUE p. 1). This brief is filed within 60 days of April 8, 2021 and is timely.

II. STATEMENT OF THE ISSUES

Is Registration of GUNTHER’S (“Applicant’s Mark”) for use on ice cream, non-dairy frozen confections (in Cl. 30) and in connection with restaurant services featuring ice cream and non-dairy frozen confections, namely frozen dessert parlors (as amended in Cl. 43) likely to cause confusion with:

GUNTHER TOODY’S for use in in connection with “restaurant services” (in Cl. 43); or

GUNTHER’S GOURMET for use on “sauces” (in Cl. 30)?

III. RECITATION OF THE FACTS

The GUNTHER’S Mark. The restaurant services associated with Applicant’s Mark GUNTHER’S feature ice cream and non-dairy frozen confection. Applicant’s “ice cream has a strong and loyal following among ice cream connoisseurs who enjoy the experience of consuming the product at Applicant’s frozen dessert parlor.” Feb. 27, 2021 Request for Reconsideration **Exhibit H**, TSDR p. 51-53 (the “**Klopp Declaration**”), at ¶ 10.

The GUNTHER’S mark has been in use since as early as 1940 for ice cream and the iconic Sacramento ice cream parlor and since at least as early as 1974 for non-dairy frozen confections. Klopp Declaration ¶ 3.

Applicant attracts a strong and loyal following among ice cream connoisseurs. Klopp Declaration ¶ 10. During 2019 Applicant sold over 200,000 gallons of ice cream alone. *Id.*, ¶ 4. Applicant, and its goods and services, have garnered unsolicited media attention. *Id.*, ¶ 7; see, e.g., Feb. 27, 2021 Request for Reconsideration **Exhibit L**, TSDR pp. 76 – 79, and Feb. 27, 2021 Request for Reconsideration **Exhibit M.**, TSDR p. 83. Its storefront, an iconic location in the capital of California, has been added to the Sacramento register of historic and cultural resources. *Id.*, ¶ 7; see, e.g., Feb. 27, 2021 Request for Reconsideration **Exhibit N**, TSDR pp. 86 - 92. The storefront is, in fact, Sacramento’s oldest ice cream parlor. Feb. 27, 2021 Request for Reconsideration **Exhibit G**, TSDR p. 49. Notably, in 2015 Business Insider listed GUNTHER’S as the best ice cream parlor in the state of California. *Id.*, ¶ 8; see, Feb. 27, 2021 Request for Reconsideration **Exhibit O**, TSDR pp. 95 - 97.

GUNTHER’S initially referred to the original owners, William and Iva Gunther. Feb. 27, 2021 Request for Reconsideration **Exhibit G**, TSDR p. 49. Nonetheless, Applicant’s mark has acquired distinctiveness under section 2(f). July 21, 2020 Response to Office Action, TSDR p. 3. The Office found the claim was “sufficient”. Aug. 27, 2020 Final Office Action, TSDR p. 1.

“Ice cream and other frozen confections have unique temperature distribution requirements in that they must be consumed promptly after receipt, or otherwise must be transported and stored at low temperatures.” Klopp Declaration, ¶ 9.

There has been no actual confusion with the GUNTHER TOODY’S mark or the GUNTHER’S GOURMET mark and, prior to reference to these registered marks by the Office, the CEO of Applicant had never heard of the registered marks or their owners. Klopp Declaration, ¶¶ 5, 6.

The GUNTHER TOODY’S Mark. Gunther Toody is a fictional character from the Emmy winning television sitcom “*Car 54 Where are You.*” Feb. 27, 2021 Request for Reconsideration **Exhibit A**, TSDR pp. 20 -25, and Feb. 27, 2021 Request for Reconsideration **Exhibit B**, TSDR p. 27. The GUNTHER TOODY’S restaurant services offer a nostalgic diner theme based on the fictional character from a 1960’s TV show. See:

Specimens submitted in connection with the GUNTHER TOODY’S registration (Feb. 27, 2021 Request for Reconsideration **Exhibit C**, TSDR pp. 29 – 32);

The GUNTHER TOODY’S website (Feb. 27, 2021 Request for Reconsideration **Exhibit D**, TSDR pp. 34 – 36);

The GUNTHER TOODY’S social media channel (Feb. 27, 2021 Request for Reconsideration **Exhibit E**, TSDR p. 38); and

The GUNTHER TOODY’S physical storefronts (Feb. 27, 2021 Request for Reconsideration **Exhibit F**, TSDR pp. 41 – 42).

It is beyond dispute that GUNTHER TOODY'S restaurants are in fact based off of the TV show, and full of classic cars and vintage styling, paying homage to the character Gunther Toody.

The allegations in registration 1435063 indicate that the GUNTHER TOODY'S mark has been used in commerce since Aug. 21, 1986. Jan. 21, 2020 Nonfinal Office Action, TSDR p. 7.

The GUNTHER'S GOURMET mark. The specimens submitted in connection with the registration of the GUNTHER'S GOURMET mark depict "crab salsa," "lime mango salsa," "tropical style mango salsa," "pineapple orange hot sauce," and "orange balsamic vinaigrette & marinade." Feb. 27, 2021 Request for Reconsideration **Exhibit J**, TSDR pp. 64 – 69.

Sauces sold under the GUNTHER'S GOURMET mark are shelf stable and are sold online. Feb. 27, 2021 Request for Reconsideration., **Exhibit K**, TSDR pp. 71 – 74.

The allegations in registration 4556314 indicate that the GUNTHER'S GOURMET mark has been used in commerce since November 2000. Jan. 21, 2020 Nonfinal Office Action, TSDR p. 8.

IV. ARGUMENT

The refusal to register is based on the Office's assumption of what consumers "may" or "might" do when exposed to the marks (e.g., "GUNTHER'S *may* still be taken for an abbreviated reference to the registration." Aug. 27, 2020 Final Office Action, TSDR p. 4). Respectfully, this is not the standard. Likelihood of confusion is synonymous with "probable" confusion - it is not sufficient if confusion is merely "possible." American Steel Foundries v. Robertson, 269 U.S. 372, 383-84, 46 S. Ct. 160, 70 L. Ed. 317 (1926). The test of confusion cannot be based on a mere "possibility", because "[m]any consumers are ignorant or inattentive, so some are bound to misunderstand no matter how careful a producer is." Aug. Storck K.G. v. Nabisco, Inc., 59 F.3d 616, 618 (7th Cir. 1995), *reh'g denied*, (June 9, 1995). "Some confusion is always possible: but there must be some threshold quantum that crosses from mere possibility into a probability." WE Media, Inc. v. General Elec. Co., 218 F. Supp. 2d 463, 479, 68 U.S.P.Q.2d 1108 (S.D. N.Y. 2002), *aff'd*, 94 Fed. Appx. 29 (2d Cir. 2004).

A refusal to register requires a trademark to so resemble a registered mark “as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). Whether a likelihood of confusion exists is a question of law, based on underlying factual determinations. See Lloyd’s Food Prods., Inc. v. Eli’s, Inc., 987 F.2d 766, 767, 25 U.S.P.Q.2d 2027, 2028 (Fed.Cir.1993); Kenner Parker Toys Inc. v. Rose Art Indus., Inc., 963 F.2d 350, 352, 22 U.S.P.Q.2d 1453, 1455 (Fed.Cir.1992). It is determined on a case-specific basis, applying the factors set out in In re E.I. DuPont DeNemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973).

The *DuPont* factors are: (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; (2) the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use; (3) the similarity or dissimilarity of established, likely-to-continue trade channels; (4) the conditions under which and buyers to whom sales are made, i.e., “impulse” vs. careful, sophisticated purchasing; (5) the fame of the prior mark (sales, advertising, length of use); (6) the number and nature of similar marks in use on similar goods; (7) the nature and extent of any actual confusion; (8) the length of time during and conditions under which there has been concurrent use without evidence of actual confusion; (9) the variety of goods on which a mark is or is not used (house mark, “family” mark, product mark); (10) the market interface between applicant and the owner of a prior mark; (11) the extent to which applicant has a right to exclude others from use of its mark on its goods; (12) the extent of potential confusion, i.e., whether de minimis or substantial; and (13) any other established fact probative of the effect of use. In re E.I. DuPont DeNemours & Co., 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973).

The relevant *DuPont* factors here do not show *probable* confusion between Applicant’s Mark GUNTHER’S and either the GUNTHER TOODY’S mark or the GUNTHER’S GOURMET mark. There is no likelihood of confusion. The Application to register GUNTHER’S should proceed to be published for opposition.

A. The marks are dissimilar in appearance, sound, connotation and commercial impression.

In determining the similarity or dissimilarity of the marks, the marks must be compared in their entireties as to appearance, sound, connotation and commercial impression. Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 1371-72, 73 U.S.P.Q.2d 1689 (Fed. Cir. 2005). The test for the similarity of the marks is whether the marks in their entireties create the same overall impression such that confusion is likely to result. It is improper to dissect the marks when comparing the overall commercial impression. “The basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used. It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark.” In re Nat’l Data Corp., 753 F.2d 1056, 1058, 224 U.S.P.Q. 749, 750-51 (Fed. Cir. 1985). *Accord* In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 464-65, 6 U.S.P.Q.2d 1025 (Fed. Cir. 1988).

The focus is on the recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. In re Bay State Brewing Co., 117 U.S.P.Q.2d 1958, 1960 (TTAB 2016) (citing Spoons Rests. Inc. v. Morrison Inc., 23 U.S.P.Q.2d 1735, 1741 (TTAB 1991), *aff’d per curiam*, 972 F.2d 1353 (Fed. Cir. 1992)); In re C.H. Hanson Co., 116 U.S.P.Q.2d 1351, 1353 (TTAB 2015) (citing Joel Gott Wines LLC v. Rehoboth Von Gott Inc., 107 U.S.P.Q.2d 1424, 1430 (TTAB 2013)); *see also* San Fernando Elec. Mfg. Co. v. JFD Electronics Components Corp., 565 F.2d 683, 685, 196 USPQ 1, 2-3 (CCPA 1977) (“Obviously, the marks here are constructed of old linguistic elements, but they must be considered as wholes, and not on the basis of side-by-side comparison, and in the light of the fallibility of memory.”). TMEP 1207.01(b).

1. GUNTHER’S is dissimilar to GUNTHER TOODY’S.

Applicant’s Mark GUNTHER’S and the GUNTHER TOODY’S mark are dissimilar in sight, sound, and commercial impression when taken as a whole.

The similarity of appearance is nothing more than a subjective “eyeball” test, considering the overall impression created by the mark as a whole rather than simply comparing individual features of the marks. Exxon Corp. v. Texas Motor Exchange, Inc., 628 F.2d 500, 504-05, 208 U.S.P.Q. 384 (5th Cir. 1980). Indeed, even the marks WIZZ and GEE WHIZ were found not to be similar to the eyeball. J. Wiss & Sons Co. v. Gee Whiz Tool Corp., 364 F.2d 910, 150 U.S.P.Q. 583 (6th Cir. 1966). See also Little Caesar Enterprises, Inc. v. Pizza Caesar, Inc., 834 F.2d 568, 572, 4 U.S.P.Q.2d 1942 (6th Cir. 1987) (“The differences in sound and appearance between “Little Caesar” and “Pizza Caesar” are obvious, and the addition of the acronym “USA” to the latter mark almost doubles the number of syllables and heightens the distinction.”)

Applicant’s Mark GUNTHER’S consists of a single word that is the possessive form of “Gunther”. The GUNTHER TOODY’S mark consists of two words that is possessive of “Gunther Toody”. The GUNTHER TOODY’S mark has twice as many syllables, at least twice as many vowels, and what could be considered a fanciful word “toody” (which can be pronounced many ways, i.e., consumers may pronounce it like toddy, taa-dee, or toody, too-dee). As a whole, the marks are different in appearance and sound.

To determine connotation and commercial impression, it is proper to look to the context of trademark use, such as material on labels, packaging, advertising and the like. 4 McCarthy on Trademarks and Unfair Competition § 23:26 (5th ed.). See also In re Nationwide Industries, Inc., 6 U.S.P.Q.2d 1882 (T.T.A.B. 1988); Elvis Presley Enterprises Inc. v. Capece, 141 F.3d 188, 46 U.S.P.Q.2d 1737 (5th Cir. 1998) (district court erred in determining the meaning of defendant's mark without considering the advertising context into which defendant placed its mark).

Gunther Toody is a fictional character from the Emmy winning television sitcom “*Car 54 Where are You.*” Feb. 27, 2021 Request for Reconsideration **Exhibit A**, TSDR pp. 20-25, and **Id.**, **Exhibit B**, TSDR p. 27. The Office states that “this program appeared on American television screens nearly sixty years ago, and questions whether an appreciable fraction of consumers today have any awareness of this

program or the “Gunther Toody” character in it” Aug. 27, 2020 Final Office Action, TSDR p. 4. Applicant respectfully disagrees.

Specimens submitted in connection with the registration of the GUNTHER TOODY’S mark clearly convey a nostalgic diner theme. Feb. 27, 2021 Request for Reconsideration **Exhibit C**, TSDR pp. 29 – 32. This theme is supported further by the website (id., **Exhibit D**, TSDR pp. 34 – 36), social media channel (id., **Exhibit E**, TSDR p. 38), and physical storefronts (id., **Exhibit F**, TSDR pp. 41 - 42) each illustrating actual use of the GUNTHER TOODY’S mark. Gunther Toody’s restaurant is in fact based off of the TV show, and full of classic cars and vintage styling, paying homage to the character Gunther Toody. The commercial impression of the GUNTHER TOODY’S mark connotes Car 54’s Gunther Toody, which is further evidenced by the registrant’s name: “Car 54, LLC.”

Applicant’s Mark GUNTHER’S refers to the original owners, William and Iva Gunther. Feb. 27, 2021 Request for Reconsideration **Exhibit G**, TSDR p. 49. GUNTHER’S does not connote Gunther Toody. The Office argues inconsistently and hypothetically, that “GUNTHER’S *may* still be taken for an abbreviated reference to [GUNTHER TOODY]”. Aug. 27, 2020 Final Office Action, TSDR p. 4. Gunther Toody cannot be both, as suggested by the Office, be forgotten and a source of consumer confusion by those which would otherwise believe that GUNTHER TOODY is a full name of an individual such that it could be truncated to just such person’s first name.

Nonetheless, the marks must be considered in their entirety, and not dissected. TOODY’S is a prominent element of the registered mark. TOODY is the element the Registrant made possessive, i.e., possessive of Gunther Toody and not simply Gunther. The Office provides no legal basis for dissecting an element of the mark, especially in a way that wholly changes the intended and actual connotation and commercial impression.

The Office previously asserted GUNTHER’S was incapable of identifying the source of Applicant’s Goods and Services as “primarily merely a surname” under Section 2(e)(4). Jan. 21, 2020 Nonfinal Office Action, TSDR p. 4. Applicant, in response, submitted a claim of acquired distinctiveness

under Section 2(f). Jan. 21, 2020 Nonfinal Office Action, TSDR p. 5. The extensive evidence Applicant provided of acquired distinctiveness over decades of continuous and exclusive use for Applicants Goods and Services lead the Office to withdrawal the Section 2(e)(4) refusal. Aug. 27, 2020 Final Office Action, TSDR p. 1. Indeed the Office has conceded GUNTHER'S distinguishes Applicant's Goods and Services from those of others - the antithesis of consumer confusion

Applicant's Mark GUNTHER'S and the registered GUNTHER TOODY'S mark, despite sharing the word GUNTHER, are significantly dissimilar in appearance, sound, connotation and commercial impression.

2. GUNTHER'S is dissimilar to GUNTHER'S GOURMET.

Applicant's Mark GUNTHER'S and the GUNTHER'S GOURMET mark also are dissimilar in sight, sound, and commercial impression when taken as a whole.

As to sight and sound, again, the cited GUNTHER'S GOURMET mark has twice as many syllables and at least twice as many vowels. Moreover, the GUNTHER'S GOURMET mark has a unique alliteration that aids in memory and makes it distinct from Applicant's Mark GUNTHER'S. The G-G alliteration of GUNTHER'S GOURMET makes the mark, as a whole, different in appearance and sound.

As to the connotation and commercial impression, the Office states that "[c]onsumers are generally more inclined to focus on the first word... in any trademark or service mark" and that "a descriptive part of a mark, e.g., 'GOURMET', is of less significance to the mark's overall commercial impression". Jan. 21, 2020 Nonfinal Office Action, TSDR p. 3. "Weak" portions in a composite mark might be given less weight in the comparison, but cannot be dissected, ignored and given no significance at all.

Additions to a mark can significantly alter the commercial impression for the mark in its entirety. See In re Farm Fresh Catfish Co., 231 USPQ 495 (TTAB 1986). It is well established that "[t]he commercial impression of a trade-mark is derived from it as a whole, not from its elements separated and considered in detail." Estate of P.D. Beckwith, Inc., v. Comm'r of Patents, 252 U.S. 538, 545-46, 40 S. Ct. 414, 417, 64

L. Ed. 705 (1920). The presence of even a generic term must be considered in comparing the marks as a whole, even if it is disclaimed.

In *Juice Generation, Inc. v. GS Enterprises LLC*, Opposition No. 91206450, the owner of a family of PEACE AND LOVE marks for restaurant services opposed an application for PEACE LOVE AND JUICE for juice bar services. The Board sustained the opposition and the Federal Circuit reversed and remanded. *Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 1341, 115 U.S.P.Q.2d 1671 (Fed. Cir. 2015) finding:

“The Board did not err in giving less emphasis to the word JUICE when it noted that the term is generic But the Board did not set forth an analysis showing that it avoided the error of giving no significance to the term, which is impermissible notwithstanding that the term is generic and disclaimed.” .

Id.

Here, the use of “GOURMET” in the cited GUNTHER’S GOURMET is significant – it adds an elevated level to the commercial impression of the mark. “Gourmet” is defined as “of, relating to, or being high quality, expensive, or specialty food typically requiring elaborate and expert preparation,” *Gourmet*, Merriam-Webster.com Dictionary. **Exhibit 1** attached.¹ Consumers seeking “gourmet” food are understood to be more discerning regarding the source of the desired goods and services and thus less likely to be confused as to source. The “GOURMET” element of the registered mark has significant weight, especially due to the mnemonic alliteration discussed above.

In contrast, the Applicant’s Mark GUNTHER’S simply conveys that the goods and/or services are those of “Gunther”. Consumers acquainted with the GUNTHER’S mark are aware of the quality only because the mark has become distinctive over decades of use. Therefore, Applicant’s Mark GUNTHER’S

¹ This tribunal can take judicial notice of dictionary definitions. Fed. R Evid. 201(b)(1); TMEP 1208.04.

and the cited GUNTHER'S GOURMET mark, despite sharing a single common word GUNTHER are significantly dissimilar in appearance, sound, connotation and commercial impression.

B. The Goods and Services are Dissimilar.

The goods or services must be related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source. Otherwise, even if the marks are identical, confusion is not likely. See, e.g., Coach Servs., Inc. v. Triumph Learning LLC, 668 F.3d 1356, 1371, 101 U.S.P.Q.2d 1713, 1723 (Fed. Cir. 2012); Shen Mfg. Co. v. Ritz Hotel Ltd., 393 F.3d 1238, 1244-45, 73 U.S.P.Q.2d 1350, 1356 (Fed. Cir. 2004); In re Thor Tech, Inc., 113 U.S.P.Q.2d 1546, 1551 (TTAB 2015); Local Trademarks, Inc. v. Handy Boys Inc., 16 U.S.P.Q.2d 1156, 1158 (TTAB 1990) (finding liquid drain opener and advertising services in the plumbing field to be such different goods and services that confusion as to their source is unlikely even if they are offered under the same marks).

1. GUNTHER'S frozen dessert parlor services are dissimilar to GUNTHER TOODY'S restaurant services.

Both the registration for GUNTHER TOODY'S and the Application for registration of GUNTHER'S recite "restaurant services". The present Application, however, is limited to restaurant services featuring ice cream and non-dairy frozen confections, namely frozen dessert parlors.

The restaurant services associated with the GUNTHER TOODY'S mark pertain to sit down diners. GUNTHER TOODY'S restaurant services offer the experience of stepping back into a diner of the past. It is not uncommon for consumers dine out at a sit down restaurant and, instead of ordering dessert at the restaurant, leave and go to their favorite dessert parlor for that special treat. It is instructive to note that the Federal Circuit observed that while many restaurants are known as specializing in a particular food or beverage, that does not lead to a conclusion that confusion is always likely for a similar mark used by all kinds of restaurants and for all kinds of foods or beverages:

“[S]ome restaurants sell their own private label ice cream, while others well their own private label coffee, but that does not mean that any time a brand of ice cream or coffee has a trademark that is similar to the registered trademark of some restaurant, consumers are likely to assume that the coffee or ice cream is associated with that restaurant The potential consequences of adopting such a principle would be to limit dramatically the number of marks that could be used by producers of foods and beverages.”

In re Coors Brewing Co., 343 F.3d 1340, 1346, 68 U.S.P.Q.2d 1059, 1064 (Fed. Cir. 2003). See In re Giovanni Food Co., Inc., 97 U.S.P.Q.2d 1990 (T.T.A.B. 2011).

In contrast, the restaurant services associated with Applicant’s Mark GUNTHER’S features ice cream and non-dairy frozen confection, namely frozen dessert parlors. Applicant’s “ice cream has a strong and loyal following among ice cream connoisseurs who enjoy the experience of consuming the product at Applicant’s frozen dessert parlor.” Klopp Declaration ¶ 10 .

Practically speaking, restaurant services and frozen dessert parlors (i.e., restaurant services featuring ice cream and non-dairy frozen confections) are different even though both provide consumable products. A consumer seeking a frozen dessert does not typically go to a sit down restaurant that provides full meals. Rather they will go to their favorite specialty dessert provider. Moreover, frozen dessert parlors are typically viewed less as restaurants and more as locations to get – straight from the manufacturer – that special treat.

GUNTHER TOODY’S restaurant services and GUNTHER’S frozen dessert parlors are distinct. Consumers encounter the different services, and the different services marketed, in a way that consumers would not assume the different services originated from the same source. Thus confusion is not likely.

2. GUNTHER’S ice cream and non-dairy frozen confections are dissimilar to GUNTHER’S GOURMET sauces.

The goods of the cited registration are marinades, vinaigrettes, salsa, salad dressings, and sauces. As an initial matter, the Office states that the pertinent goods are “sauces”, that the GUNTHER’S GOURMET “registration lists other goods as well, such as salad dressing, but this refusal has never been based on them,” and “the GUNTHER’S GOURMET registration was cited only for its ‘sauces’”. August 27, 2020 Final Office Action, TSDR p. 3 – 4.² Thus the Applicant proceeds with the understanding that the refusal is only as to the “sauces” goods of the GUNTHER’S GOURMET mark.

Sauce is defined as “a condiment or relish for food especially: a fluid dressing or topping” and “something that adds zest or piquancy. *Sauce*, Merriam-Webster.com Dictionary. **Exhibit 2** attached.³ Salsa is defined as “a usually spicy *sauce* of chopped tomatoes, onions, and peppers that is commonly served with Mexican food”. *Salsa*, Merriam-Webster.com Dictionary **Exhibit 3** attached.⁴ A search of the website foodnetwork.com for “sauce” yields savory condiments, including hollandaise sauce, alfredo sauce, tartar sauce, cocktail sauce, marsala sauce, marinara sauce, amatriciana sauce, bechamel sauce, and gorgonzola sauce. Feb. 27, 2021 Request for Reconsideration **Exhibit I**, TSDR pp. 55 – 62.

The specimens submitted in connection with the GUNTHER’S GOURMET registration depict salsa sauces and savory sauces: “crab salsa,” “lime mango salsa,” “tropical style mango salsa,” “pineapple orange hot sauce,” and “orange balsamic vinaigrette & marinade”. Feb. 27, 2021 Request for Reconsideration **Exhibit J**, TSDR pp. 64 – 69. The purpose of specimens is to show the manner in which the mark is seen by the public and provide supporting evidence of facts recited in the application. MPEP § 904. GUNTHER’S GOURMET “sauces” refer to savory condiments or salsas.

² See also, April 7, 2021 Reconsideration Letter, TSDR p. 2 (“Registration of the applied for mark for applicant’s class 30 goods was refused based on the “sauces” set forth in the GUNTHER’S GOURMET registration”)

³ See Footnote 1 supra on Judicial Notice.

⁴ See Footnote 1 supra on judicial notice.

The present Application is for use in connection with ice cream and non-dairy frozen confections. These goods are neither related nor complimentary to savory condiments or salsas. Complementary goods are those that are sold to the same class of purchasers, or are similar in use or function. AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 204 U.S.P.Q. 808 (9th Cir. 1979), abrogated by Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003). Ice cream and non-dairy frozen confections are not complementary to (savory) sauces - they are distinct in both use and function, and consumers are not likely to purchase (savory) sauces for use with ice cream. Perhaps a small and unique category of what could be considered “sauces” in the abstract may be used on frozen desserts, however it is clear that these “sauces” are not what is contemplated with use of the GUNTHER’S GOURMET mark.

Because the goods are neither identical or complementary, consumers would not encounter the goods marketed in a way such that they would assume they originated from the same source. Confusion is not likely.

C. The Trade Channels are Dissimilar.

Goods and services are *presumed* to travel in the same channels of trade to the same class of purchasers. In re Viterra Inc., 671 F.3d 1358, 1362, 101 U.S.P.Q.2d 1905 (Fed. Cir. 2012). The Office *presumes* that the trade channels used by GUNTHER’S and GUNTHER TOODY’S, and GUNTHER’S and GUNTHER’S GOURMET, are used by the same consumers in the same fields of use. However, an applicant can produce evidence to rebut this presumption. Zheng Cai v. Diamond Hong, Inc., 901 F.3d 1367, 1372, 127 U.S.P.Q.2d 1797 (Fed. Cir. 2018).

1. Frozen dessert parlors and restaurant services are offered in distinct and dissimilar retail facilities.

When consumers look to purchase frozen dessert, they don’t seek out a sit down restaurant; they seek out a specialty shop. Frozen dessert parlors are quick stops, typically walk through experiences, where you can pick it up and eat it immediately or rush home to bring it to your family before it melts. Ice cream melts; it must be consumed quickly.

Sit down restaurant diners are the opposite of quick. When a consumer goes to a diner first they wait for a table, then they wait for someone to bring them beverages, then for someone to take their order, then for their order to be prepared and brought out to the table, then for the check to be brought. By the time that a consumer gets to order at a diner, a customer at a frozen dessert parlor has likely already finished their dessert. In short, the experience of selecting, traveling to, and receiving services from a frozen dessert parlor are completely different than that of a conventional restaurant.

In addition the cost of full service dining can be a factor increasing the care exercised by consumers. Even where the goods are not expensive, the nature of certain buyers can be more discriminating than the ordinary purchaser. Barbecue Marx, Inc. v. 551 Ogden, Inc., 235 F.3d 1041, 1045, 57 U.S.P.Q.2d 1307 (7th Cir. 2000) (“We can expect that customers will exercise a reasonable degree of care when planning to dine at a restaurant of [defendant's \$20/meal] caliber.”).

Because the channels of trade (the retail location, staffing, menu, price and time commitment) are distinct, consumers will not expect the source of the services to be the same.

2. Ice cream and non-dairy frozen confections are distributed differently than sauces.

“Ice cream and other frozen confections have unique temperature distribution requirements in that they must be consumed promptly after receipt, or otherwise must be transported and stored at low temperatures.” Klopp Declaration, ¶ 9.. Frozen desserts are not shelf stable because it melts.

In contrast, sauces (even, arguendo, Ghirardelli chocolate “sauces”) are shelf stable, easily shippable, and can be consumed months or years after purchase. Sauces, such as those “sauces” under the GUNTHER’S GOURMET mark, are sold online. Feb. 27, 2021 Request for Reconsideration **Exhibit J**, TSDR pp. 65 – 67, Feb. 27, 2021 Request for Reconsideration **Exhibit K**, TSDR pp. 71 - 74. It could take several days after purchase for the goods to be received and consumed.

Even if both GUNTHER'S ice cream and non-dairy frozen confections, and GUNTHER'S GOURMET sauces were available in the same store, the frozen desserts would be in the freezer section and the sauces would be in a dry goods aisle. Assuming that consumers purchased these items at the same time, they would understand the need to transport and handle them differently. Certainly, they would also appreciate that frozen confections were to be consumed and culinarily used differently than sauces.

Because the channels of trade are different, consumers will not be confused as to the source of the relevant goods.

D. Concurrent Use Without Actual Confusion.

A long period of concurrent use of the marks with no actual confusion between them is relevant evidence confusion is unlikely. Concurrent use for a considerable time without any evidence of confusion is "a factor which may properly be given some weight." Smith v. Tobacco By-Products and Chemical Corp., 243 F.2d 188, 190, 113 U.S.P.Q. 339 (C.C.P.A. 1957). "[W]hen the parties have made significant use of their respective designations in the same geographic market for a substantial period of time, the absence of any evidence of actual confusion may in some cases justify an inference that the actor's use does not create a likelihood of confusion." Restatement Third, Unfair Competition § 23, comment d (1995). The Third Circuit has placed substantial weight on concurrent use with no actual confusion:

"If a defendant's product has been sold for an appreciable period of time without evidence of actual confusion, one can infer that continued marketing will not lead to consumer confusion in the future. The longer the challenged product has been in use, the stronger this inference will be."

Versa Prods. Co. v. Bifold Co., 50 F.3d 189, 205, 33 U.S.P.Q.2d 1801 (3d Cir. 1995), cert. denied, 516 U.S. 808, 133 L. Ed. 2d 19, 116 S. Ct. 54 (1995).

Applicant's Mark GUNTHER'S has been in use since 1940 – over 80 years. Klopp Declaration, ¶ 3. The allegations in the relevant registrations indicate that the GUNTHER TOODY'S mark has been used

in commerce since Aug. 21, 1986 and the GUNTHER'S GOURMET mark has been used in commerce since November 2000. Despite nearly 33 years of concurrent use of the Applicant's Mark GUNTHER'S and GUNTHER TOODY'S, and 20 years of concurrent use of the Applicant's Mark GUNTHER'S with GUNTHER'S GOURMET, Applicant is aware of no evidence of any confusion. The only knowledge by Applicant of the GUNTHER TOODY'S mark or the GUNTHER'S GOURMET mark came by way of the Office Action.

Applicant has a long and prominent industry presence. There is little likelihood that confusion would occur without Applicant's knowledge. Applicant sells nearly 200,000 gallons of ice cream alone each year. Applicant, and its goods and services, have garnered unsolicited media attention. E.g., Feb. 27, 2021 Request for Reconsideration **Exhibit L**, TSDR pp. 76 – 79 and *Id.*, **Exhibit M**, TSDR p. 83. Its storefront, an iconic location in Sacramento, the capital of California, has been added to the Sacramento Register of Historic and Cultural Resources. *Id.*, **Exhibit N**, TSDR pp. 86 – 92. The storefront is, in fact, Sacramento's oldest ice cream parlor. Feb. 27, 2021 Request for Reconsideration **Exhibit G**, TSDR p. 49. In 2015 Business Insider listed Gunther's as the best ice cream parlor in the State of California. *Id.*, **Exhibit O**, TSDR pp. 95 – 97. Applicant attracts a strong and loyal following among ice cream connoisseurs. Klopp Declaration ¶ 10.

V. SUMMARY.

Applicant is a venerable and successful purveyor of premium frozen desserts. Applicant has been continuously using the GUNTHER'S mark since before the U.S. entered the Second World War and before the Lanham Act took effect. The GUNTHER'S mark has garnered media attention, consumer recognition, a strong following and commercial success.

Despite the prominence of the GUNTHER'S mark and its decades of exclusive use for ice cream, non-dairy frozen confections, and frozen dessert parlors, there has been no evidence of actual confusion with either the GUNTHER TOODY'S diners or GUNTHER'S GOURMET sauces. The GUNTHER'S Mark is distinctive for ice cream, non-dairy frozen confections, and frozen dessert parlors. The mark itself

and the associated goods and services are not confusingly similar to the marks and goods/services in the registrations cited by the Office. Confusion is not only improbable but actually non-existent.

Applicant respectfully requests that this tribunal order the final refusal to register be withdrawn as to both Class 30 and Class 43, and allow the application proceed to be published for opposition.

Dated: June 7, 2021

Respectfully Submitted,

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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that the foregoing Applicant's Appeal Brief is being transmitted electronically to the United States Patent and Trademark Office's Trademark Trial and Appeal Board on June 7, 2021.

Signature: /s/Marcus N. DiBuduo

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gour·met | \ 'gur-, mā , gur-'mā \

Definition of gourmet

(Entry 1 of 2)

: a [connoisseur](#) of food and drink broadly : [connoisseur sense 2](#) a film gourmet

gourmet

[adjective](#)

Definition of gourmet (Entry 2 of 2)

: of, relating to, or being high quality, expensive, or specialty food typically requiring elaborate and expert preparation a gourmet meal gourmet cooking a gourmet chef/restaurant It offers guests tennis courts of red clay, pheasant hunting, a spa, gourmet dining and a wine cellar with more than 900 selections.— Bruce Schoenfeld also : equipped for the preparation of such food a gourmet kitchen

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Synonyms for gourmet

Synonyms: Noun

- [bon vivant](#),
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- [gastronomist](#),
- [gourmand](#)

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Choose the Right Synonym for *gourmet*

Noun

[epicure](#), [gourmet](#), [gourmand](#), [gastronome](#) mean one who takes pleasure in eating and drinking. [epicure](#) implies fastidiousness and voluptuousness of taste. [gourmet](#) implies being a connoisseur in food and drink and the discriminating enjoyment of them. [gourmand](#) implies a hearty appetite for good food and drink, not without discernment, but with less than a gourmet's. [gastronome](#) implies that one has studied extensively the history and rituals of haute cuisine.

Examples of *gourmet* in a Sentence

Noun food critics have to be *gourmets* in order to write about food in an informed way

Recent Examples on the Web: Adjective Two blocks west at the Euro Food Depot, a handful of customers wearing blue Qualcomm lanyards browsed the aisles of the small import market selling hard-to-find *gourmet* items from France like chestnut spread, pork rillettes and foie gras mousse. — Pam Kragen, *sandiegouniontribune.com*, 1 Mar. 2018 Drai's rooftop playhouse offers music lovers 30,000 square feet of slip-proof pool deck to get low on, plus luxury cabanas, day beds, two full-service bars, palm trees and a full-service *gourmet* cafe. — Kat Bein, *Billboard*, 21 Feb. 2018 An Alaskan might forgo a latte to pay \$5 for a single perfect Sumo mandarin orange, flown in by New Sagaya, the city's largest *gourmet* market. — Julia O'malley, *New York Times*, 20 Feb. 2018 The restaurant offers made-from-scratch *gourmet* mac and cheese in 15 varieties, such as pizza mac and cheese, Philly cheesesteak mac and cheese and goat cheese mac and cheese. — Megan Becka, *cleveland.com*, 20 Feb. 2018 In the main area, guests dined on meatballs, *gourmet* chicken wings and all manner of fruit. — The Masked Observer, *AL.com*, 14 Feb. 2018 Free activities for kids, unlimited mimosas for \$10 and live music, local produce, plants, exotic flowers, herbs, baked goods, *gourmet* foods, teas, coffee and specialty pet products at the Waterfront Commons in downtown West Palm Beach. — Jennifer Jhon, *South Florida Parenting*, 14 Feb. 2018 Dean & DeLuca, the Kansas *gourmet* chain with stores uptown and in SouthPark, expanded its selection of meat, seafood and produce last spring at its Phillips Place store. — Katherine Peralta, *charlotteobserver*, 13 Feb. 2018

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First Known Use of *gourmet*

Noun

1820, in the meaning defined [above](#)

Adjective

1904, in the meaning defined [above](#)

History and Etymology for *gourmet*

Noun

French, from Middle French, alteration of *gromet* boy servant, vintner's assistant, probably ultimately from Middle English *grom* groom

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noun

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: a person who enjoys and knows a lot about good food and wine

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gourmet

noun

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Definition of *sauce*

(Entry 1 of 2)

- 1 : a condiment or relish for food especially : a fluid dressing or topping
- 2 : something that adds zest or piquancy
- 3 : stewed fruit eaten with other food or as a dessert
- 4 : pert or impudent language or actions
- 5 slang : [liquor](#) —used with *the*

sauce

[verb](#)

\ 'sòs

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, usually 'sas *for sense 3* \

sauced; saucing

Definition of *sauce* (Entry 2 of 2)

[transitive verb](#)

- 1a : to dress with relish or seasoning
- b : to cover or serve with a sauce
- 2a archaic : to modify the harsh or unpleasant characteristics of
- b : to give zest or piquancy to
- 3 : to be rude or impudent to

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Synonyms for *sauce*

Synonyms: Noun

- [dressing](#),
- [gravy](#)

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Examples of *sauce* in a Sentence

Noun She tried several *sauces* before she found one she liked. chicken in a cream *sauce* Cover the strawberries with the chocolate *sauce*. This pizza needs more *sauce*. I've had enough of your *sauce*!

See More  

Recent Examples on the Web: Noun The Big Apple-themed Brozinni Pizzeria boasts pies that start at 16 inches, along with garlic knuckles, dough twisted, baked and dipping in garlic butter *sauce*. — Cheryl V. Jackson, *The Indianapolis Star*, 24 May 2021 Spread *sauce* on bottom half of bread, then layer with lettuce, tomatoes, chicken, pickles and remaining bread. — Kate Merker, *Good Housekeeping*, 20 May 2021 There is ají de gallina, a cozy stew to stave off the chill night air on the patio, tender pulled chicken in a creamy, golden ají amarillo *sauce*. — *BostonGlobe.com*, 18 May 2021 One my second visit, tiny anchovies in soy *sauce* with seared peppers. — Andi Berlin, *The Arizona Republic*, 14 May 2021 The second course is pasta primavera with spring vegetables in a light *sauce*. — Susan Selasky, *Detroit Free Press*, 7 May 2021 RedHot *sauce*, Play-Doh, Formica, Pringles, Uno or Magic 8 Ball? 25. — Jeff Suess, *The Enquirer*, 2 May 2021 The business really took off, though, after Olvera's daughter convinced her mother to add trendy tacos made with birria — a slow-cooked beef in a red pepper *sauce* — to the menu. — Kathy Stephenson, *The Salt Lake Tribune*, 30 Apr. 2021 Spread *sauce*, cheese, and your favorite pizza toppings on flour tortillas. — Casey Barber, *CNN*, 14 Apr. 2021 Recent Examples on the Web: Verb Silky, tender shreds of jackfruit in sweet barbecue *sauce* the texture of hair conditioner. — Alex Beggs, *Bon Appétit*, 26 May 2021 When serving, place chicken on plate and spoon *sauce* around it, to keep the skin crispy. — Tribune News Service, *cleveland*, 17 May 2021 To save time before dinner, make the dipping *sauce* a day or two in advance and store it in the fridge. — *BostonGlobe.com*, 11 May 2021 Like a good sport, Annie agrees to try again with him before discovering he's failed to wipe barbecue *sauce* off his hand before slipping it under her skirt. — *Washington Post*, 30 Apr. 2021 Let *sauce* cool for 20 minutes before tasting or using. — Susan Selasky, *Detroit Free Press*, 1 Apr. 2021 Fried bolts of yuca are the correct side, in a staggering, tangy chimichurri *sauce*. — Nick Rallo, *Dallas News*, 31 Mar. 2021 Spoon the vegetables and *sauce* around the chicken and sprinkle with parsley. — *BostonGlobe.com*, 23 Mar. 2021 Tips come from the end pieces of the pork spare rib slabs, and these provided a masterclass in balancing a tender bite and *sauce* with just the right amount of char and smoke. — Chuck Blount, *San Antonio Express-News*, 19 Feb. 2021

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First Known Use of *sauce*

Noun

14th century, in the meaning defined at [sense 1](#)

Verb

15th century, in the meaning defined at [sense 1a](#)

History and Etymology for *sauce*

Noun

Middle English, from Anglo-French, from Latin *salsa*, feminine of *salsus* salted, from past participle of *sallere* to salt, from *sal* salt — more at [salt](#)

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More Definitions for *sauce*

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Kids Definition of *sauce*

- 1 : a usually thick liquid poured over or mixed with food spaghetti *sauce*
- 2 : boiled or canned fruit cranberry *sauce*

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Definition of *salsa*

- 1 : a usually spicy sauce of chopped tomatoes, onions, and peppers that is commonly served with Mexican food also : a similar sauce made with a main ingredient other than tomatoes peach salsa
- 2 : popular music of Latin American origin that has absorbed characteristics of rhythm and blues, jazz, and rock

Examples of *salsa* in a Sentence

The band was playing *salsa*. We're taking classes in *salsa*.

Recent Examples on the Web Zapata currently has about 25 employees working at a West Valley City location to make the *salsa* and dips, which can be found online and at stores across the valley and nationwide, including Harmons, Smith’s and Sprouts Farmers Markets. — Becky Jacobs, *The Salt Lake Tribune*, 19 May 2021 Choose between Freebirds' quest blanco, guacamole or *salsa*. — Kelly Tyko, *USA TODAY*, 5 May 2021 But Bataan then transforms the song into scorching *salsa*, full of hard vamps on the piano, vocal call and response, and densely syncopated percussion. — Elias Leight, *Rolling Stone*, 30 Apr. 2021 The finished lamb comes wrapped a pastel-blue tortilla, along with charred tomatillo *salsa*, onions and fresh cilantro. — *Washington Post*, 19 Apr. 2021 Available to order from March 10 through 17 on the Chipotle app and website, the all-vegan menu item consists of white rice, pinto beans, roasted chili-corn salsa, tomatillo-red *salsa* and guacamole, with a side of tortilla chips. — Piet Levy, *Milwaukee Journal Sentinel*, 5 Mar. 2021 In addition to the group’s live performance, N’Klabe was recognized at the first edition of DNZ for being one of the most influential *salsa* ensembles of these times. — Pamela Bustios, *Billboard*, 27 Apr. 2021 The chiles, simmered in the *salsa*, are completely infused with its flavor, and the heat melts the cheese. — *New York Times*, 21 Apr. 2021 Those dollars have bought signage, paid small stipends to out-of-work instructors for activities like meditation and *salsa* dancing, and hired bands and other entertainment. — Caroline Spivack, *Curbed*, 7 Apr. 2021

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Spanish, literally, sauce, from Latin, feminine of *salsus* salted — more at [sauce](#)

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More Definitions for *salsa*

salsa

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English Language Learners Definition of *salsa*

- : a spicy sauce made with tomatoes, onions, and hot peppers that is commonly served with Mexican food
- : a type of popular Latin-American music
- : dancing that is done to salsa music

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Kids Definition of *salsa*

- 1 : a spicy sauce of tomatoes, onions, and hot peppers
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